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**Before the  
Federal Communications Commission**

**JUL 12 1996**

**FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY**

**In the Matter of  
  
Federal-State Joint Board  
Universal Service**

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**CC Docket No. 96-45**

**MEMORANDUM OF THE  
STATE MEMBERS OF THE UNIVERSAL SERVICE JOINT BOARD**

**Introduction**

The members of the Joint Board who have been nominated by the National Association of Regulatory Utility Commissioners ("NARUC") and the National Association of State Utility Consumer Advocates ("NASUCA") (hereinafter referred to as "State Members") have joined to issue this Memorandum concerning the failure of the Federal Communications Commission ("FCC" or "Commission") to refer the second portion of Section 254(k) of the Telecommunications Act of 1996 ("Act") to the Joint Board in the Notice of Proposed Rulemaking ("NPRM") released on March 8, 1996 in this proceeding.<sup>1</sup> As the State Members consider this an important issue, we have determined to issue this Memorandum at this point in the Joint Board process concerning the referral of "any necessary cost allocation rules, accounting safeguards, and guidelines" required by § 254(k).

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<sup>1</sup> The members nominated by NARUC are the Honorable Julia L. Johnson of the Florida Public Service Commission, the Honorable Kenneth McClure of the Missouri Public Service Commission, the Honorable Sharon L. Nelson of the Washington Utilities and Transportation Commission, and the Honorable Laska Shoenfelder of the South Dakota Public Utilities Commission. The member nominated by NASUCA is Martha S. Hogerty, Public Counsel for the State of Missouri.

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**Non-Referral of Section 254(k)**

In the NPRM issued in this case, the Commission made a decision that a portion of § 254(k) would not be referred to the Joint Board. In the NPRM, the Commission discussed the decision not to refer the second portion of § 254(k) to the Joint Board as follows:

The last sentence in Section 254(k) states that "[t]he Commission, with respect to interstate services, and the States, with respect to intrastate services, shall establish any necessary cost allocation rules, accounting safeguards, and guidelines to ensure that the services included in the definition of universal service bear no more than a reasonable share of the joint and common costs of facilities used to provide those services." The explicit use of the language "the Commission, with respect to interstate services, and the States, with respect to intrastate services," indicates that Congress intended to give the separate jurisdictions the flexibility to review these issues separately.<sup>2</sup>

We consider that Congress has conferred upon the Joint Board and the FCC an important and essential role in limiting the shift of "joint and common" costs to universal service under § 254(k). Section 254(a)(1) clearly indicates Congressional intent that the FCC "shall institute and refer" to the Joint Board a proceeding to implement § 254. Thus, it was the intent of Congress that the FCC would not proceed with a set of interstate universal service regulations until it had received and reviewed the Joint Board recommendations on this point.<sup>3</sup>

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<sup>2</sup> NPRM at ¶ 12. The footnotes to this portion of the NPRM indicated that the FCC would "commence a rulemaking shortly" to implement the second portion of § 254(k). NPRM at n.32. To date no such rulemaking has been issued in this or any other proceeding. The FCC has also referred to the Joint Board the first portion of § 254(k) in the NPRM. NPRM at ¶ 41.

<sup>3</sup> This cost shifting limitation was also complemented by other provisions. For example, Congress intended to ensure that rates for telephone service would remain just, reasonable and affordable. Cf. 47 U.S.C.A. 254(i).

Section 254(k) also emphasizes Congressional intent that universal service should bear no more than a reasonable share of joint and common costs.<sup>4</sup> In effect, Congress has created through the Joint Board a federal/state partnership in order to generate a recommended set of "rules, accounting safeguards and guidelines" (hereinafter referred to collectively as "safeguards") in order to fulfill the mandate of § 254(k). However, as the Commission has not referred this portion of § 254(k) to the Joint Board, the Joint Board will not have the opportunity to consider the public comments, which would have been produced in such a proceeding, and issue a recommendation in order to fulfill its obligations in this regard.<sup>5</sup> While the Joint Board may consider that portion of § 254(k) in its completion of its other obligations, the Joint Board will not have the opportunity to completely fulfill its role.<sup>6</sup>

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<sup>4</sup> In the Joint Explanatory Statement of the Committee of Conference (Conference Committee Report) it is explained that "[t]he Commission and the States are required to establish any necessary cost allocation rules, accounting safeguards, and other guidelines to ensure that universal service bears no more than a reasonable share (and may bear less than a reasonable share) of the joint and common costs of facilities used to provide both competitive and noncompetitive services." Conference Committee Report at 129 (emphasis added). The Conference Committee Report emphasizes that universal service may provide even less than a reasonable share of such costs.

<sup>5</sup> Since the release of the NPRM in this proceeding, the State Members have considered whether the failure to refer this issue to the Joint Board might be corrected by subsequent action of the FCC. However, at this point in the Joint Board process the State Members consider that such revision is unlikely to occur without further action being initiated and have issued this Memorandum in order to pursue this issue further.

<sup>6</sup> We also note, for example, that the Joint Board has been given the opportunity to consider an increase in the Subscriber Line Charge through the NPRM. NPRM at ¶114. The Joint Board may consider whether an increase in the SLC is consistent with the limitation as to how joint and common costs may be recovered from universal service. Nonetheless, the State Members consider that this opportunity to review the SLC does not address completely the safeguards required by Section 254(k).

By failing to refer the issue to the Joint Board, the FCC risks implementing a policy on joint and common cost allocation that may be inconsistent or incompatible with the universal service policies and goals as would be determined by the Joint Board on this issue.

Moreover, the NPRM suggests that to refer the second portion of § 254(k) to the Joint Board would interfere with the intent of Congress "to give the separate jurisdictions the flexibility to review these issues separately."<sup>7</sup> The State Members submit that allowing the Joint Board to issue a recommendation concerning the interstate safeguards called for in § 254(k) would not interfere with a state commission's review of intrastate issues. The State Members emphasize that it is not their intention to bind state commissions by any § 254(k) safeguard recommendation from the Joint Board.

#### **Present Importance of Section 254(k) Safeguards**

The State Members consider that the "necessary cost allocation rules, accounting safeguards, and guidelines" required by § 254(k) were intended to function as a continuing protection against the shifting of joint and common costs that § 254(k) restricts. The State Members suggest that such cost shifting presents a current source of concern for universal service. As the industry enters a more competitive environment, there may arise many incentives to shift joint and common costs to the least competitive services. We consider that the FCC may soon be required to consider these forces in its own regulatory decisions.

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<sup>7</sup> NPRM at ¶ 12.

For example, since the release of the NPRM in this proceeding, the FCC has released a Notice of Proposed Rulemaking to implement the interconnection provisions of the 1996 Act.<sup>8</sup> In that Interconnection NPRM, the FCC recognized "the interrelationship between this proceeding, our recent initiated proceeding to implement the comprehensive universal service provisions of the 1996 Act and our upcoming proceeding to reform our Part 69 access charge rules."<sup>9</sup> Access charge reform may present similar issues related to shifting joint and common costs.

The State Members emphasize that an FCC decision to set pricing standards for unbundled network elements and access charges on the basis of long run incremental costs may have significant implications for the recovery of embedded joint and common costs. Long run incremental cost studies can assign the majority of joint and common costs to universal service; thus, increasing the burden placed on universal service. Carriers seeking to advance their positions in the market will have strong incentives to shift costs away from competitive services and toward universal service. This would allow carriers to claim an increasing amount of federal support funding. Under such a scenario, the proper workings of both the competitive market and universal service mechanisms could be compromised. Section 254(k) safeguards will then become increasingly important. Thus, the State Members continue to be concerned about not having the opportunity to participate in the creation of these safeguards.

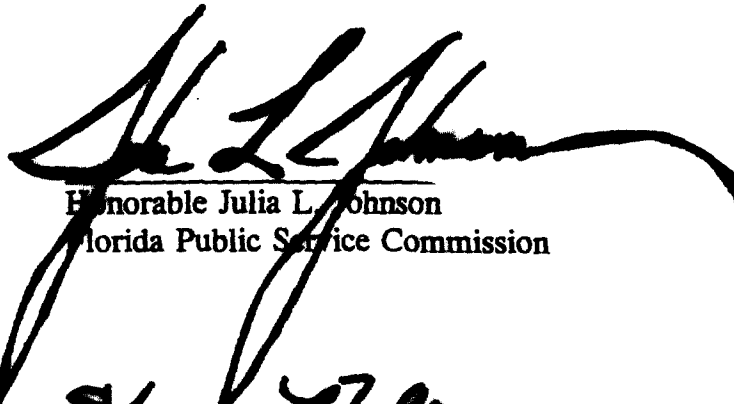
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<sup>8</sup> In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Notice of Proposed Rulemaking, CC Docket 96-98, released April 19, 1996 (Interconnection NPRM).

<sup>9</sup> Id. at ¶ 3.

**Conclusion**

The State Members consider the failure to refer the § 254(k) safeguards matter to the Joint Board a significant issue which will affect current regulatory decisions. We have determined that it is necessary to issue this Memorandum and conclude that we have the authority to act in this form.<sup>10</sup> The State Members believe that we should not await the development of the Joint Board's Recommended Decision to raise this concern and issue this Memorandum as a result.



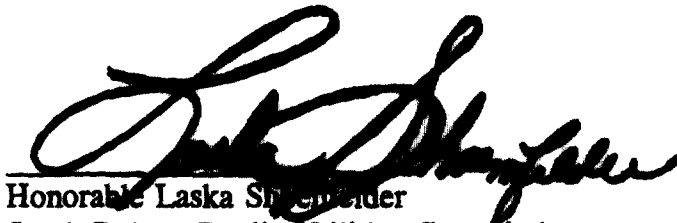
Honorable Julia L. Johnson  
Florida Public Service Commission



Honorable Kenneth McClure  
Missouri Public Service Commission



Honorable Sharon L. Nelson  
Washington Utilities and Transportation  
Commission



Honorable Laska Shepherd  
South Dakota Public Utilities Commission.



Martha S. Hogerty  
Public Counsel for the State of Missouri.

July 12, 1996

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<sup>10</sup> The State Members note that a Joint Board is given the powers of an administrative law judge pursuant to 47 U.S.C. § 410(a). Administrative law judges generally have authority to raise issues on their own motion. See, e.g., 47 C.F.R. §§ 0.341(b) & 1.291(a)(1) (1995).